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Human Rights and Liberties: 50 Years after Brown v. Board of Education - Guantanamo at the Supreme Court

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HUMAN RIGHTS AND LIBERTIES: 50 YEARS AFTER BROWN v. BOARD OF EDUCATION

GUANTÁNAMO AT THE SUPREME COURT

INTRODUCTION

Ever since the attacks of September 11, 2001, the United States government has detained hundreds of people from various countries without providing them with access to a court of law, legal representation, and family visits. The *Hastings Race and Poverty Law Journal* devoted a panel at its second annual symposium, *Human Rights and Liberties: 50 Years After Brown v. Board of Education*, to discuss the experience of immigrants who were detained at the Guantánamo prisons and the attacks on their human rights and civil liberties. Professor Richard Boswell, U.C. Hastings College of the Law, moderated a panel that included Banafsheh Akhlaghi, Managing Partner of Akhlaghi & Associates, which specializes in immigration and civil rights; Dorothy Ehrlich, Executive Director of the ACLU of Northern California; and Robert Rubin, Legal Director of the Lawyers' Committee for Civil Rights. The panel explored the intersection of 9/11 and the rights of immigrants through a discussion of the following issues: the implications of the labeling of persons as noncombatants and their indefinite detention at the Guantánamo U.S. military base, the targeting of selected foreigners in the United States, and other actions with the stated purpose of identifying persons who pose a risk to the security of the United States.

PANEL TRANSCRIPT

ROBERT RUBIN

As we talk about civil rights during a time of war, one is reminded of the well-known saying that when the cannons speak, the Muses are silent. In other words, as war rages, we lose our sources of inspiration. We must guard against such notions as we seek to ensure that our system of laws are not silenced during these troubling times.

There is another well-known quote: "It is emphatically the province and duty of the judicial department to say what the law is." Judicial review is a lofty principle, but it is often an abstract principle when we are talking about immigrants. The plenary power doctrine removes immigration decisions from searching constitutional scrutiny and essentially immunizes blatant race discrimination in immigration policy. This judicial restraint impacts not only the immigrants involved in the particular case but seriously damages U.S. citizens who share the race or national origin of those immigrant groups; when our immigration policy declares that Haitians or Salvadorans or Chinese are excludable on the grounds of ancestry alone, a badge of inferiority attaches to these citizens of the same ancestry.

It started in 1889 with the Chinese Exclusion case where the Supreme Court upheld the exclusion of a returning Chinese resident. The Court declared it would not question the political branches of government, particularly in the context of foreigners of a different race who will not assimilate with "us." Since then, despite the fact that the rights to Due Process and Equal Protection embodied in the 5th and 14th Amendments apply to persons, not just citizens, the civil rights of immigrants have been the first casualties in times of crisis when the majority seeks to impose its will on the minority.

In the 1920s (post-World War I), during the Palmer raids we rounded up immigrants who were suspected Communists. In the 1940s (during World War II), in a fit of blind vengeance, we lashed out at Japanese-Americans and interned them in detention camps. In 1979-80, we went after law abiding Iranians whose only crime was that they looked like the terrorists who were holding Americans hostage in Tehran.

I represented many of those Iranian students as a civil rights attorney in Mississippi in the late 1970s when, at the height of the Iranian hostage crisis, students were being suspended from school and being kicked out of the country. We sought a preliminary

injunction but tensions were so high that I had a federal judge literally shaking his finger at my clients, berating them and accusing them of holding U.S. hostages in Tehran.

We have seen that, when an atmosphere is created such that foreigners, or *certain* foreigners, are considered suspect, even the judiciary can be swayed. And so it was when the Supreme Court upheld the constitutionality of the internment of the Japanese during World War II in *Korematsu v. United States*.¹

From that shameful decision, Justice Jackson dissented and poignantly said that if any fundamental assumption underlies our system, it is that guilt is personal, and not inheritable. Jackson understood that a mistake *by the judiciary* in times of war or terrorism is worse than a mistake of the legislature or the executive—he reasoned that, whereas a mistake of the other branches of government can be easily undone through legislative or executive action, the judiciary’s mistakes remain even once the threat of terrorism passes, entrenched as legal precedent and a magnet to be applied to new issues and laws. Jackson put it well in his dissent in *Korematsu* that the principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need. Therein lies the importance of the role of the courts in remaining above the fray and enforcing the rule of law during times of crisis.

Indeed, the whole purpose of the Equal Protection Clause is to offer protection to the minority against the periodic discriminatory impulses of the majority. So before we target immigrants during this crisis, let’s think back to Oklahoma City and ask why we did not call anyone for broad restrictions on the civil rights of tall, white guys after Tim McVeigh blew up the federal building—in fact, the only profiling that occurred came in the first few hours when initial reports identified Middle Eastern men as responsible.

I would like to focus for a moment on the Department of Justice investigatory interviews of 5000 young Muslim men conducted in immediate aftermath of 9/11—not because it is the most nefarious action (it is not considering the incommunicado detentions and secret hearings) but because this type of selective questioning demonstrates how much war on terrorism is not only ineffective but counter-productive, particularly when done by local cops. If there is reason to believe that terrorists are hiding within the Arab immigration community, law enforcement would be more effective by working with the millions of law-abiding members of the community than by alienating them by treating many members as suspect solely because of their ethnicity. Once an entire community

1. 323 U.S. 214 (1944).

is considered suspect, once we engage in collective guilt by association, the law abiding members of that community are less willing to cooperate with law enforcement—so rather than fostering the trust so necessary at times like this, we breed fear and resentment.

Local police departments have begun to recognize this reality. Police throughout the San Francisco Bay Area, Oregon, and Michigan refused to cooperate with Ashcroft's effort to interrogate the 5,000 Arab immigrants, targeted solely because they fit the profile of being young, Arab, and recently arrived in the United States.

Why have the police taken this stance? It is not because they are civil rights converts. They have done so for the same reason many have refused to accept Ashcroft's offer to enforce federal immigration laws—because they are committed to enlisting the cooperation of members of the community—victims of crime: witnesses to crime will not come forward if they think that they might, in turn, be targeted for arrest. The CLEAR Act,² unfortunately, is a proposal mandating local police to assist Ashcroft in identifying immigrants and is working its way through Congress.

When we violate civil rights in this country, the implications do not just play out in the domestic arena. For example, Spain refused to extradite terror suspects due to the U.S. imposition of the death penalty and concern over whether those who received the death penalty were given fair trials. The same holds true with our secretive detentions and closed hearings which will hardly give us standing to challenge secret trials of dissidents in Peru or China.

Another assault on the rights of immigrants is the recently enacted Aviation and Transportation Security Act, that bars non-U.S. citizens from serving as airport baggage screeners. We have targeted the immigrant community, blanketly assumed that members of that community are security risks, and we fire them from their jobs. Now at San Francisco International Airport, eighty percent of the screeners are noncitizens, predominantly Filipinos who are long-term permanent residents of this country. A painfully cruel irony of this policy is that currently, more than 37,000 noncitizens serve in U.S. Armed Forces (5 of first 10 Californians killed in Iraq were non-citizens). So the message is that immigrants are not such a security risk that we will keep them from fighting and dying for this country but we cannot trust them to wave a wand over our luggage.

We indulge our stereotypical biases which come all too easily

2. Clear Law Enforcement for Criminal Alien Removal Act.

during times of crisis; we retreat into that which is familiar. We fear and reject the unfamiliar. We forsake the Biblical stranger. When we forsake the stranger, we are led down the path of secretive detentions of 1200 immigrants. When we forsake the stranger, we de-humanize that person and rationalize the most pernicious civil rights infringements.

In Ashcroft's latest post-9/11 assault on immigrant rights, he has intervened in a Haitian refugee case and, in a broad precedent-setting opinion, reversed a decision by one of his own administrative judges who had ordered the refugee's release on bond. Ashcroft reversed this decision *not* because he found that the individual posed a flight risk or a danger to the community—the traditional criteria for release on bond—but to send a message to other would-be refugees that they are going to suffer long-term detention if they come to the United States seeking asylum. To the head of the Department of Justice, it matters not whether you are fleeing persecution and otherwise entitled to be free from detention because, as Ashcroft wrote in his opinion, release of such aliens into the United States would come to the attention of others in Haiti and encourage future surges in illegal migration by sea.

What has happened to individualized determinations? Apparently, they are too burdensome and do not send the proper message of deterrence to others.

Let me describe a pending case that truly exemplifies the targeting of immigrants and the criminalization of immigrants. I am representing Hady Omar in a suit for damages against various top federal officials. Hady, an Egyptian immigrant was flying home on 9/11 from Florida to Arkansas to be with his wife for their first anniversary. The next afternoon, while playing with their infant daughter on the front lawn, he was arrested by the FBI.³ Never charged with a crime, Hady was held on an alleged immigration violation, even though he was married to a U.S. citizen.

So began a 73-day ordeal in a maximum security prison in Louisiana where he was brutally subject to intrusive body cavity searches with the added humiliation being observed by a crowd of laughing government officials, including two women during the search. Hady was also subject to 24-hour video surveillance throughout his entire confinement in the prison, even when he had to use the bathroom.

He was denied access to his lawyer. He was denied visitation from his U.S. citizen wife and child. He was ridiculed when he attempted to practice his religious faith such that he began praying under his blanket.

3. Federal Bureau of Investigation.

Of course, knowing he was not a terrorist, Hady also knew the only reason he was in a maximum security prison having his body cavities searched was because he was an Arab. Just imagine how he felt at that moment.

This type of secretive, preventive, indefinite detention smacks of totalitarian governments and is anathema to our system of government, which is about openness and fairness. We must resist this impulse for collective punishment. We must resist the wholesale labeling of immigrants as "security risks." But sadly, the INS,⁴ now having been made a part of the Department of Homeland Security, will only encourage the notion that we view immigration through the lens of potential "terrorist threats."

We have got to make sure that in the process of our so-called war on terrorism, we do not destroy the very freedoms that we are supposedly fighting for: that is what is core at the civil rights issues around the War on Terrorism. But many Americans feel that in order to have great security, we have got to have fewer rights. What they are talking about is that they will give up some of your—that is, you Arabs—some of your rights in order to have more of our security. So it is a false dichotomy. But the pollsters will tell you Americans today are willing to sacrifice their rights for greater security. It is their security and somebody else's rights. It is a false dichotomy. So it all comes back to the role of law and the role of the courts to protect the rights of the minority, particularly during times of crisis. *Brown v. Board of Education*⁵ that we are celebrating today on its 50th anniversary was a beacon. Other decisions like *Korematsu* was a travesty. Yet it is precisely at such points in time, when we are confronted by domestic or foreign crisis, that we must be particularly unyielding in our commitment to the role of law. We must make sure that the tyranny of the majority is protected by the one branch of government that is not there to protect the interest of the majority but is there to uphold the role of law and protect those interests of the minority that are particularly jeopardized during times of crisis, like those we are confronting today.

BANAFSHEH AKHLAGHI

Good afternoon. Thank you very much, thank you very much. I thank you because you have led me directly into what we do every day at my office. So that was one example of one Egyptian man in the United States. As we go through the discussion, I know that in

4. Immigration and Naturalization Services.

5. 347 U.S. 482 (1954).

this room we have got law students and law professors and a lot of law, right? As we go through this, I want you to start imagining yourselves doing the work that I do. Walk with me as I start literally, point by point, giving you illustration after illustration of human beings' lives post-9/11. Can you do that with me? Because one day you too will be doing this in your own paradigm, wherever that is.

So 9/11 happened. I left my post, teaching constitutional law and started defending Muslims, Middle Easterners, and South Asian men. Listen to the racial profile. Anywhere from the ages of 16 to 64 I have seen. Do you understand the racial profile? We are not after the women because for some reason they do not think that we are a threat. Little do they know. What we do see though are the women, the sisters, the mothers, the wives, in tears looking for their loved ones sitting across from me in my office while their loved one is locked away in Yuba County, in Oakland, in San Diego, in Los Angeles, in Florence, Arizona, in Minnesota, in Florida. Shall I go on? Across the country. So the first client was being questioned by the FBI solely because he was a secretary of a mosque. Do you remember how we were attacking all the mosques, all the *masjids*, because that is where the terrorists lay, right? Then we moved to special registration because we took care of them, right? We got the mosques all under control. Then we moved to special registration. How many of you in here know of someone who registered? We are doing it together so come on, together. How many? That is a lot of hands. I think that is the most hands I have seen other than at a Middle Eastern, Muslim function. That is a lot of hands. So you have personally been affected post-9/11. You have personally been affected.

Many of our men went in in November and December of 2002. Many of our men never came back out. They were valid visa holders, meaning they were brought here to this country to work, for the most part, for these high-tech companies. That is where most of my clients came from, the Santa Clara and San Jose area. Valid visa holders. They were not illegal, they were not out of status. Most of our clients had an approved I-130 petition, meaning some relative applied for them. They had waited in queue the years that they have to wait in queue, and at some point received their approval so that they can now do what is called "adjust their status." They were taken into custody. So what happened to all of those folks that were out of status? That is what we were being told. Many of the folks who walked in, walked in because they honestly believed that they were in status. They were rounded up, they were shackled, they were handcuffed. Some of my clients were flown cross-country from state to state because at that point, you see, there

were not enough detention facilities with beds available for all those men. So they slept on cement floors. They were not given enough blankets. They were not given adequate food. Many of them were not even allowed to shower for seven days. These are dentists, high-tech employees, business owners, students. These are the people that you know that you raised your hands for. I found some of them in San Diego.

And do you know that the district director in San Diego said to me and the others that were in the room that they were not prepared for all these people to come in? That is why they rounded everybody up. So I asked them, "So you are saying that everyone was going to be presumed guilty until they were proven innocent? How is this different than Iran?"

They were released, then we went to January. Thirteen named countries. Then we went to February. An additional five countries. March, five more. April, five. All of a sudden, out of the blue, when all the named Muslim, Middle Eastern, and South Asian countries had been registered, they stopped naming anymore countries, even though Ashcroft had said that every alien in the United States will be registered. What happened? In December 2002, I was speaking at the MPAC Conference, the Muslim Public Affairs Council they have in Long Beach annually. It happened to also be during the weekend that I was going to go and get my clients out of prison. There I do not know where this came from—God's intervention—I do not know where this came from, but there I predicted that we will first go after the visa holders and the undocumented or those pending, and then we will go after the Green Card holders. And then we will go after people like me who naturalized in this country, because I am Iranian, I am Muslim, and I came to this country when I was all of five years old. This is what Muslim and Middle Eastern looks like. I wish they would show us on CNN⁶ every now and again. And that is where we are at now. December of last year to the present, the caseload that we are seeing—I have been baffled by it. Now listen to me.

You guys are walking through this with me as the attorney, right? The caseload that we are seeing, the folks that are calling are Green Card holders, right? Legal permanent residents, but they are being placed in removal proceedings. They are having their alien card taken from them, and they are being placed in a removal proceeding as a result of some critical conduct. That is what the charges are. So baffled, right? Scratching my head. What is up? I should also say we are still getting all those, you know, nonimmigrant visa holder calls as well as now we are having these

6. Cable News Network.

calls. And I started to ask my staff, I said, "Who told someone, somewhere that we do critical immigration? We do not do critical immigration."

So I started to look at the cases. Walk it through with me. December 2002 a Baha'i family-mother, four daughters-walk into my office. They say our son is in Yuba County and has been there since November; he has been there for the last month. Anyone familiar with the Baha'i religion, vis-à-vis the Islamic Republic of Iran? To be Baha'i in Iran is, well, it is death. It just equates to death. So the family had acquired asylum validly as a result of their Baha'i religion here in the United States some 23 years ago. The son they were talking about, in 1980-walk it with me, okay?-in 1984, had committed petty theft, \$50. In 1987, he had committed petty theft, \$130. And in 2003 was at Home Depot-walk it with me-was at Home Depot, had a cart full of items, had \$80 cash on his person, had seen an item near the door because-everyone has been at Home Depot, there are racks right by the door-pushes the cart towards the door. As he is extending his hand to bring the product off the shelf, a security guard grabs him and proclaims that this man was going to push the cart out the door. These are all part and parcel of the facts from his critical case, okay? Why is he being deported? Why would we take a man who said they understand the Baha'i religion vis-à-vis the Islamic Republic of Iran? Why would we take a man that we granted asylum to and then deport him back to a country when we know surely the only outcome would be death? We wish it would only be death, but it would be a gruesome death.

So the family came. I said the women are the ones that we do not go after, right? The women came and they said, "What can you do for my son?" I looked at the case and I thought well, if we have given him asylum once, why would we bloody not give him asylum again? That is a form of relief. So we went to court. We pled in front of a God-sent judge, and he too thought that was a phenomenal form of relief. Because an assault-which is what the third charge was with the security guard-coupled with the two petty thefts when balanced would absolutely not give rise to deporting this man. Does it? Walk it with me.

After the ruling of the judge and he ordered and granted asylum, the Department of Homeland Security, the attorney for the Department of Homeland Security, said they were going to appeal. At which time the judge said, "Have you read the State Department reports? Do you know anything about what is happening to Baha'is in Iran?" "We're appealing, Your Honor."

And we had not received fingerprints yet on this individual. March 2nd was that individual hearing. I said that he was taken into custody in November of 2003. He had been in the custody of

the government for all those months, and no one had fingerprinted him. Now my only question is either whether somewhere the issue of national security was no longer of merit (and that is why the procedures were not taken care of regarding this alien) or whether there is something amiss. Because procedurally that is what you do. You take someone into custody, you fingerprint them, all ten fingers, right? I was outraged. I am Iranian of course, right? I was outraged, the judge was outraged, but they gave him two weeks. We came—and the innocent man was taken back to Yuba County.

Two weeks later, we came back. One of the attorneys for the government said we have the results of the fingerprints. And the judge said, "Fantastic. I have been waiting to release this innocent man." "But, Your Honor, the notes say here that the attorney that was on the case is reserving appeal." He said, "You realize the case. This is a very, very strong case." Reiterated the facts again. "We understand he is reserving appeal." March 15th they took him back to Yuba County. March 17th we were granted another date to come before the judge to find out and to get to the bottom of what this appeal is all about. That was Wednesday morning at 9. Tuesday at 5, the day before the hearing, I receive a phone call from the attorney from the government side explaining to me that her colleague had made a mistake about those fingerprints. The fingerprints, she said, were taken as we were ordered to on March 2nd. But you see today, March 16th, we still have not sent them out for the FBI third county check." At which time I said, "How are you going to explain this to the judge?" "Just going to explain it that way. We have not done it, has not been done." I said many other choice words, conversation came to an end, and I told her we would see her in court the next day.

We went to court the next day. The judge, with a smile on his face said, "Can we release this innocent man today?" And I said, "Your Honor, the most atrocious thing happened." He said, "Let's go on the record." And he pointed his finger onto the tape and the drama began. And if I was not there, and if I had not witnessed it, I would have—I, who have been doing the work that I have been doing—would have not believed it took place in the United States of America. Are you still walking with me? The judge looks at the attorney for the Department of Homeland Security and asks, "What's going on?" She says, "Your Honor, it appears that my colleague had made a mistake about the fingerprinting, and when I noticed that a mistake had occurred, I attempted to remedy it." And I said, "There is one point that you are missing, and the point is that you remedied it all of yesterday."

Here is the point you need to know. The fingerprint results take 30 to 45 days to come back. I was already shocked that after

two weeks they said fingerprint results had come back. So that meant this man would go back to Yuba County, be seated there for another 30 to 45 days, and they have 30 days for the clock to tick for an appeal to be submitted. And by the time they go through their process for appeal, it will take an additional six months for investigations and on and on and on. So really and truly what she was saying was that they were going to take this man back to Yuba County, a location he had been housed in since November of 2003, some five months now, an asylum grantee from Iran as a Baha'i, for an additional seven to eight months. And she remedied it. At which time I said, "Your Honor, then we want bond. He is 236C bond ineligible." 236C takes the authority out of the hands of the judges from issuing bond and places it directly in the hands of the Department of Homeland Security when they can show that two critical acts have been committed, \$50 and \$130 and an assault.

The judge was outraged. I honestly thought that the judge was going to resign that day. He asked her over and over again, "What are you going to do with this man? Are you going to release this man?" "236C, Your Honor, will not allow us to." "Are you going to release this man?" "Are you telling me that I have the authority to override Congress' mandate? I don't have that authority." But they have prosecutorial authority, and they can utilize their prosecutorial authority. So the judge asked, "Then if you don't have authority, why are you seated here?" We attempted to get the supervisor on the phone. No supervisor contacted the judge. She returned, stating that her supervisor, the supervisor's supervisor, has said that she speaks for the Department of Homeland Security, and they will not release the man.

The mother and the sisters, screamed, "Take us but release our son. He is not a criminal, he is not a murderer." The mother laid her body in the courtroom, asking for the judge to take her body and release her son's. And they took him away.

The next morning, what would you do? The law is not helping you, right? The judge is trying to do his best, and you are the attorney representing the respondent who is responding to an allegation brought by whom? The Department of Homeland Security. You all understand that scale of justice.

What happened to that scale when I walk in every day with a Muslim, Middle Eastern man standing next to me? Here is where I believe God exists. We took it to the media that day because that's all I knew to do. The next day at 9, the mother called, crying, "What do we do-how do I tell his 87-year-old father that he is not coming home? We could have stayed in Iran. At least we knew why we were being persecuted." Ten o'clock, she called back, and I thought what am I going to say to this woman? And she said, "He called, he

is in San Francisco, and he has been released.” Someone came to their senses on that case. But what if we were not there? What if we did not make a stink? What if we did not fight? What if? And there are so many cases that we do not know about that we cannot fight for that remain in detention facilities and then are deported out of this country too—only they know what their fate will be.

What can you all do? If this community of scholars, educators, and advocates do not know about what is happening in this country, who is going to know? Educate yourselves, try to follow the crazy, crazy HR3522 passed November 19, 2003 by the House. HR3522. Please take a look at it. Start reading the Immigration Naturalization Act. Start reading the USA PATRIOT Act⁷ and see how these acts intertwine within each other and how beautifully they have been sewn together that not even air can penetrate. And from there start to educate. The fine lady that was speaking first, and I don’t recall her name, she said, “They did a doll experiment.” She’s talking about the black doll’s bad conduct, right? There was bad conduct in the story. They knew to point to the black doll. When there is a terrorist act or an act of aggression in the world, which doll do you think they point to? I will tell you. They look like my clients, like my father, like my brother. That is who we point to. Thank you for listening.

DOROTHY EHRLICH

I want to thank you all very much for inviting me. It is an honor to be here. I want to first begin by congratulating the students for putting on this event today. I have been inspired by their incredible dedication, and I find myself feeling very hopeful about the future knowing that we are in such very, very good hands with such inspiring leadership of these law students at Hastings. So thank you all. I want to pick up from where our speakers left off and switch gears slightly because I want to talk to you as an activist and as an advocate. And I want to talk about the fact that we are beginning to make some progress and that the work that has been done by many of the people in this room, especially people on this panel because they have been at it since September 11th, is truly beginning to make a difference. And I want to sort of track that progress and talk a little bit about how you have made a difference and how we can continue to make an even larger one. A year ago—if we just look back that long—a year ago we were in the midst of the

7. Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act.

Special Registration Program, where some 85,000 young men from about 25 predominantly Muslim countries were being rounded up throughout this country. They were being interrogated and fingerprinted. Many were held for days. Some of them, who were as young as 16, had been delivered to the INS offices by their mothers, and then they went missing. In the end, deportation proceedings were initiated against some 14,000 of those 85,000 people who had voluntarily appeared, and not one of them, not one of those 85,000 people were charged with any terrorism-related criminal activity.

One year ago today, there were still—and this is very approximately—about 100 people still languishing in federal prison from the 1,200 people who were originally held following the devastating attacks on September 11th. We do not know how many people were even originally rounded up or how many people remained there a year ago. All of them—at least most of the 1,200—were deported. They were deported following secret deportation proceedings. Many of them never knew what the charges were against them. Their families did not know where they were being held. They did not have the right to counsel, and they were whisked away and deported. They have left this country, and we could never really hear their stories, and we have never been fully able to pierce this veil of secrecy that has surrounded these cases.

One year ago, there were 650 men being held in Guantánamo Bay, Cuba, *incommunicado* indefinitely, again not knowing what crimes they were accused of, without access to counsel, with no opportunity to contest in any court in any land the factual or the legal basis for their confinement. The government asserted that it is entitled to lock these people up indefinitely without any access to the courts, and we believe that this violates our most basic notion of fundamental fairness. These people were captured off the streets of their country, and they were being held indefinitely without charges. We know that the only good that can come of this is that it serves to encourage other countries to do the same and to put the lives of American soldiers, as well as American civilians, at risk throughout the world. One year ago civil liberties were under assault with the heaviest hand falling on immigrants and on the Arab-American, South Asian, and Muslim communities. The USA PATRIOT Act had been in place since October 26, 2001. It had been in place for about eighteen months, and there was a growing fear throughout this country that this Act of Congress and a series of other related actions by the executive branch meant that we were no longer safe to speak out. We were no longer safe to dissent, that we were no longer safe to even worship in our own mosques or to give contributions to charities that were carrying out important and good

works. When Congress passed the USA PATRIOT Act, just days following September 11th, there was only one member of the U.S. Senate who was willing to vote against it. Every other member of the U.S. Senate voted for it. People were cowed into believing that to not be in support of this astonishing Act, which increased the power of the government—that to not vote for it would have their constituents believe that they did not care about their safety, that they were not being tough on terrorists. One year ago today this country was at war. Everywhere I went people would come up to me, especially that first year and a half, people would come up to you and say, “If I join the ACLU,⁸ will I be on a list?” Or “If I attend that demonstration, they are going to be taking our pictures. What is going to happen to us?” People genuinely, I think understandably, feel that that they were living in a surveillance state. And despite that fact, hundreds of thousands of people marched on the streets throughout this country and throughout this world to protest against this war. They were not afraid. Regardless of the surveillance, regardless of the crackdown on dissent, they still came out and they came out in large numbers. People in this country could not be stopped. They were not only not chilled by the government surveillance, but also to some degree, I think, they were invigorated. They were invigorated by the fact that the audacity of the acts of this government, the unthinkable policies that were being promulgated, brought them to the streets.

People were, for the first time, “disappeared” here in this country and in prison camps in Guantánamo Bay. People were being held outside the jurisdiction of the law and laws like the USA PATRIOT Act were implemented. They knew they were being implemented, but the facts were being held in secret. And people decided that they were going to do something about it. And although we were hardly at a place where we can claim victory, my point today is that by speaking out, by protesting, we are beginning to make progress. And there is genuine momentum that is building. We are beginning to change the debate, and that is really making a difference.

One example, a very small example, is the Special Registration Program, which was the cause, I should say, of widespread outrage and protest. People did not sit idly by, and there were protests outside the INS offices because of the work of some lawyers in this room and elsewhere. These cases were brought to the attention of the press, and the mainstream journalists told the stories of what was happening to these young men who were being held throughout the country. We wrote to members of Congress and we

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demanded that these programs be terminated. We only received a very partial victory, a portion of this discriminatory program was shut down earlier this winter, including the requirement for annual registration. Many other very confusing provisions remain that continue to target individuals based on their place of birth and not on individualized suspicion and not on their behavior. But some significant portion of this terrible law has been abandoned, and that is because people spoke out.

Moving now to the issue of secret detentions, and here, as I mentioned, the facts are very fuzzy since all of this has been done in secret. But a dramatic event took place in that finally the Department of Justice agreed early last summer to unveil its own findings of its own investigation on what the Department of Justice had done over the previous eighteen months. This is despite the fact that we had not been able to convince even a court at that time or a high court to give us access to this information. But they did their own report and admitted that not only were people being held, in many cases illegally, but their rights were being abused. People were being held in conditions of confinement that were intolerable, and individuals were definitely abused at the hands of their jailers, the employees of the Department of Justice. So the Department of Justice was finally forced to speak out about its own wrongdoing.

Now regarding the detentions at Guantánamo Bay, after nearly two years without any court being willing to step in and hold the government accountable for these actions that had been widely condemned, not only here in this country but throughout the world, finally the U.S. Supreme Court has agreed to hear a challenge to the Guantánamo Bay prison and oral argument will be held on April 26th. The courts will hear the demand that the 600 men who remain in prison be given access to the universally recognized right to due process under the U.S. Constitution as well as under the Geneva Conventions and under the Universal Declaration of Human Rights. A broad coalition has been formed to urge the Court to give these prisoners access to justice, and it is an incredible coalition. It includes former prisoners of war, former military officials, former activists as well as people of faith, civil libertarians, and many human rights groups who have come forward to urge the Court to take action.

A wonderful decision that came down in December 2003 from the Ninth Circuit Court of Appeals that rejected the government's position and claimed that the executive branch was running roughshod over the rights of citizens and aliens alike. Again, these are all signs of progress and clearly a sign that momentum is beginning to build against these policies. And the issue that people have focused on that has really been a catalyst for a lot of this

momentum has been the very effective community organizing that has gone on throughout the country. That has been the organizing to call for the repeal or the reform of the USA PATRIOT Act, the resolution campaign. And as I mentioned in the early days after September 11th there were only a handful of organizations and members of Congress who were willing to speak out and to condemn the restrictions on civil liberties. That has really changed. As of last week the City of Santa Clara became the 50th official city council that had spoke out against the USA PATRIOT Act. They are part of 260 jurisdictions throughout the country, including four states, that have passed resolutions calling for the reform of the USA PATRIOT Act. It is not all Berkeley and Santa Cruz. It is New York City and Los Angeles and Chicago and Oklahoma City and Sacramento—places that you probably would not have expected the local government bodies to have called upon Congress to take action. That is just a remarkable development and has made again a very huge difference. Eighteen months ago, we hired a full-time organizer to work on these resolutions and felt that it was going to be an uphill struggle and thought we could only get Berkeley and Santa Cruz. But it has just been a really remarkable campaign.

And regarding Robert's point earlier about the polls that show that people are willing to give up civil liberties in order to seek greater safety, there are actually some polls that now show people are worried about the balance between civil liberties and safety, and they are starting to understand that they do not have to give up freedom in order to be safe. So I think these messages are beginning to penetrate.

We have a very, very long way to go before we restore civil liberties in this country and begin to reclaim the principles that this democracy was meant to stand for, and to fight against this notion that there is a perpetual war against terrorism and therefore the government can take whatever steps it wants in the name of national security perpetually, and that those who disagree with those policies should be branded as disloyal. As probably every law student and certainly every student of history knows, there has been a long and dishonorable history in this country of singling out those who dissent—especially immigrants—for mistreatment at times of national crisis. And Robert described in some detail that sordid history. But I wanted to also add that sometimes we think those policies are focused only on immigrants and those who dissent. But you can really see, for instance, how the shameful period of our history—the internment of 120,000 Japanese-Americans during World War II—actually set the stage for the McCarthy period that was to follow when civil liberties were violated throughout this country. Additionally, it is important for us to remember that to

think that we can sacrifice someone else's rights and still maintain our own is simply wrong if you look at our history.

But unlike the assault on civil liberties that we have talked about today and those that occurred in the past, today there is truly a large and growing movement, a very strong and diverse coalition that is fighting against these encroachments on civil liberties. And they are not just here in this country, they are throughout the world. As many of you know, during World War II the ACLU of Northern California was one of the only organizations that challenged the internment of Japanese Americans. We represented Fred Korematsu and brought this case to the U.S. Supreme Court. When I look back in our archives and at our history, we stood virtually alone. There was almost no one. And today, when you look out and see how many organizations have come out to fight for these rights and to dissent against these policies, you really start to understand why we are getting the momentum that we are getting.

So I would like to end by just talking about action that you can take now that really will make a difference. To begin, and this focuses on something that Robert mentioned earlier, there is right now before Congress a bill which is called the CLEAR Act. This is another example of how the War on Terrorism has turned into a war against immigrants. This is a bill that if it were to pass, it would literally conscript local law enforcement agencies to enforce immigration laws. They could no longer dissent, they could no longer choose not to participate. They would be forced to be the local INS arm in the local communities. So we are asking members of Congress to oppose this discriminatory act. Already here in Northern California are members of Congress and there are 120, representatives nationally who have signed up to co-sponsor this bill. In Northern California, Representatives Pelosi, Lee, Lantos, and Lofgren have already spoken out to oppose the CLEAR Act, so we would ask you to contact your member of Congress to ask them to oppose the CLEAR Act.

The second thing we are asking people to do is to contact-and it is very important and urgent that you do this now-your member of Congress and ask them to support the SAFE Act.⁹ The SAFE Act is a reform of the USA PATRIOT Act. It is HR3352. It has about 40 sponsors in the House, and about 10 of them come from Northern California. We are pleased that the campaign we are waging is beginning to find some support. But we need you to take action. And again, this can make a difference, so I hope that you will be able to do that. I know that we have a very long way to go. One of the things that also made me hopeful is that when you think back

9. Security and Freedom Ensured Act.

again at the days following September 11th and the fear that any elected official had of speaking out in support of civil liberties at all, and you look at today, you already have one of the sponsors of the SAFE Act in the Senate, Senator John Kerry, who recently agreed to be a co-sponsor. That decision on his part is the subject of some of the first ads against candidate Kerry that President Bush is running, saying do not vote for him: "He is someone that does not care about your safety, he is not tough on terrorism. That is why he supports the SAFE Act." And so that is why it is especially important that we get the word out, that we understand the importance of what is going on in Congress today. And it should make this a very interesting campaign season as we debate these important civil liberties issues.

I know the values that many people in this room truly treasure, and these principles are often really aspirational. They are not a reality. The right to freedom and justice and equality are not rights that we are born with. They are rights that we have to fight for and every generation has had to try to reclaim. I think you are part of that long effort. Today we are truly being put to the test. We face an enormous challenge.

But I again have to say that the work of the *Hastings Race and Poverty Law Journal* students. What you are doing to speak out and to teach us here makes a huge difference. The work that is going on to build coalitions throughout this country and throughout this world is beginning to change these policies. And I believe that we really can make a difference. I want you all to be activists. I want you to join this very important struggle. All of our lives and all of our liberties really depend on it. Thank you.